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No. 29012.

In the Supreme Court of the United States

October Term, 1923.

No. 70.

JAMES C. DAVIS, Director General of Railroads and Agent designated by the President under Transportation Act, 1920, *Petitioner,*

vs.

GEORGE WECHSLER, *Respondent.*

RESPONDENT'S SUPPLEMENTAL BRIEF.

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INDEX.

PAGE

Brief. 3

Argument. 10

I. General Order 18a does not relate to jurisdiction of the subject matter of the action, but only to the venue of the action, and was therefore a subject of waiver by the defendant. 10

II. Defendant waived the provisions of General Order 18a by entering his appearance. 19

III. The decision by the Court of Appeals rests on a non-Federal ground broad enough to sustain it, and therefore this Court should not disturb the decision. 32

IV. The present case does not present any question of special importance. 36

V. The motion for new trial filed by petitioner in the trial court did not preserve the venue question for appellate review. 37

VI. The mandate of the Court of Appeals was filed in the trial court more than two months before the petition for certiorari was filed in this court, and the petition should be dismissed because of petitioner's laches. 41

Cases Cited.

PAGE

Alabama & Vicksburg Ry. Co. v. Smith Journey, 42 Sup. Ct. Rep. 6. 10

Beaupre v. Noyes, 138 U. S., l. c. 402. 34

Bilby v. Stewart, 246 U. S. 255. 36

Caldwell v. Payne, Director General, 246 S. W., l. c. 316. 15

PAGE

Central Law Journal, Vol. 88, No. 9, Feb. 28th, 1919. 13

Central Vermont Ry. v. White, 238 U. S., l. c. 513..... 35

Consolidated Turnpike Co. v. Railway Co., 228 U. S. 596, l. c. 599..... 36

Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300..... 36

Enterprise Irrigation District v. Canal Co., 243 U. S. 157..... 36

Eustis v. Bolles, 150 U. S., l. c. 369..... 33

Farrar & Brown v. United States, 3 Pet. 459 26

Federal Control Act of March 21, 1918, Section 10. 23

Howat v. State of Kansas, 42 Sup. Ct. Rep., l. c. 279. 36

In Re The F. J. Luckenbach, 267 Fed. 931.. 30

John v. Paullin, 231 U. S., l. c. 585..... 35

Johnston v. Stimmel, 89 N. Y. 117 (affirming 26 Hun. 435)..... 30

Kansas City Star Co. v. Julian, 215 U. S. 589. 32

Lee v. Chesapeake & Ohio R. R. Co., 43 Sup. Ct. Rep., l. c. 231.....17, 20

Magnum Import Co. v. DeSpoturno Coty, Adv. Opinions 1922-1923, l. c. 588.....36, 43

Maplegreen Co. v. Trust Co., 237 Mo., l. c. 362-363. 39

Mellon v. McCafferty, 239 U. S. 134..... 36

Missouri Pacific Railroad Co. v. Ault, 256 U. S. 554. 11

Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation, 258 U. S., l. c. 566-567.... 27

PAGE

Sonken & Galamba Iron & Metal Co. v. Hines, Director General, 238 S. W., l. c. 138. . . . . 17. 20, 29

State ex rel. Berkshire v. Ellison, 230 S. W., l. c. 972-3. . . . . 42, 44

State ex rel. v. Woods, 234 Mo., l. c. 25. . . . 40

United States v. New York & Oriental Steamship Co., 216 Fed. 61. . . 15, 19, 20, 21, 28

Washington v. Miller, 235 U. S., l. c. 429. . 35

Western Loan & Savings Co. v. Mining Co., 210 U. S. 368. . . . . 19, 21

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vs.

GEORGE WECHSLER, *Respondent.*

No. 29012.

RESPONDENT'S SUPPLEMENTAL BRIEF.

Respondent has heretofore filed a motion to dismiss, based upon petitioner's failure to file brief and specification of errors as required by Rule 21. Since being served with notice and copy of such motion the petitioner has served respondent with a supplemental brief. This second brief was served upon respondent on Sept. 29th, 1923, which is only

nine days before the day this cause will probably be called for argument. Petitioner is therefore still in default under Rule 21.

Without waiving, but expressly reserving, his rights in the premises, based upon the petitioner's violation of the rules of this Court, the respondent respectfully submits the following as a supplement to the statement, brief and argument heretofore filed by the respondent.

BRIEF.

I.

General Order 18a does not relate to jurisdiction of the subject matter of the action, but only to the venue of the action, and is therefore a subject of waiver by the defendant.

Alabama & Vicksburg Ry. Co. v. *Smith Journey,* 42 Sup. Ct. Rep. 6.
Missouri Pacific Railroad Company v. *Ault,* 256 U. S. 554.
Caldwell v *Payne, D. G.,* 246 S. W., l. c. 316.
United States v. *New York & Oriental Steamship Co.,* 216 Fed. 61.
Lee v. *Chesapeake & Ohio R. R. Co.,* 43 Sup. Ct. Rep., l. c. 231.
Sonken & Galamba Iron & Metal Co. v. *Hines, D. G.,* 238 S. W., l. c. 138.

II.

The defendant in the court below waived the provisions of General Order 18a by his general entry of appearance in the trial court.

The record shows that the defendant Director General entered a general appearance in the trial court on three different occasions: first, by filing a motion to strike out an amendment to the petition (Trans., p. 6); again by filing an answer containing a plea to the merits coupled with a plea

to the venue (Trans., p. 7), and again upon the substitution of Payne for Hines, by expressly entering his appearance and adopting Hines' answer (Trans., p. 8).

Western Loan & Savings Co. v. *Mining Co.*, 210 U. S. 368.
United States v. *Steamship Co.*, 216 Fed. (C. C. A.) 69.

The substituted Director General, Payne, could have refused to enter his appearance and could have stood upon his rights under General Order 18a, and in such event could only have been brought into court by summons in the regular way; but he did not see fit to do this, and voluntarily entered his appearance. He thereby waived his immunity from suit in that venue.

United States v. *New York & Oriental Steamship Co.*, 216 Fed. (C. C. A.), l. c. 69.
Lee v. *Chesapeake & Ohio Railway Co.*, 43 Sup. Ct. Rep., l. c. 231.
Sonken & Galamba Iron & Metal Co. v. *Hines, D. G.*, 238 S. W., l. c. 138.

The fact that petitioner after entering his appearance adopted the answer of his predecessor containing a plea to the venue, did not prevent the appearance from being general.

Western Loan & Savings Co. v. *Mining Co.*, 210 U. S. 368.
United States v. *Steamship Co.*, 216 Fed., l. c. 69.

The Director General had the authority to enter a general appearance and waive the objection to venue.

Farrar & Brown v. *United States,* 3 Pet. 459.
United States v. *New York & Oriental Steamship Co.,* 216 Fed. (C. C. A.) 69.
Sloan Shipyards Corporation v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S., l. c. 566-567.
Sonken-Galamba Iron & Metal Co. v. *Hines, D. G.,* 238 S. W., l. c. 138.
Johnston v. *Stimmel,* 89 N. Y. 117 (affirming 26 Hun. 435).
In Re The F. J. Luckenbach, 267 Fed. 931.

The right to sue the Director General was expressly granted by Congress.

Sec. 10, Federal Control Act of March 21, 1918.

The grant by Congress of the right to sue the Director General was not made conditional upon suit being brought in any certain venue; on the contrary the grant was unqualified in this respect.

If the Director General had the authority under the Federal Control Act to make General Order 18a, then certainly he had the power to revoke it or to waive its provisions in any given case if he deemed it to his advantage to do so.

United States vs. Kolen 226 Fed. (C.C.A.)
l.c. 15

III.

The decision by the Court of Appeals rests on a non-Federal ground broad enough to sustain it, and therefore this Court should not disturb the decision.

A case which turns on a question of waiver presents no Federal question.

Kansas City Star Co. v. *Julian,* 215 U. S. 589.
Eustis v. *Bolles,* 150 U. S., l. c. 369.
Beaupre v. *Noyes,* 138 U. S., l. c. 402.

The decision that defendant waived the venue by entering his appearance is a decision of a non-Federal question, even though the venue was prescribed by Federal authority.

John v. *Paullin,* 231 U. S., l. c. 585.

The Court of Appeals simply decided a question of local practice, and this Court will not review decisions of state courts involving only questions of local practice.

Washington v. *Miller,* 235 U. S., l. c. 429.
Central Vermont Ry. v. *White,* 238 U. S., l. c. 513.

This Court will refuse to review decisions of state courts based on non-Federal grounds broad enough to sustain them.

Bilby v. *Stewart,* 246 U. S. 255.
Cuyahoga River Power Co. v. *Northern Realty Co.,* 244 U. S. 300.

Kansas City Star Co. v. *Julian,* 215 U. S. 589.
Enterprise Irrigation District v. *Canal Co.,* 243 U. S. 157.
Consolidated Turnpike Co. v. *Railway Co.,* 228 U. S. 596, l. c. 599.
Mellon v. *McCafferty,* 239 U. S. 134.
Howat v. *State of Kansas,* 42 Sup. Ct., Rep., l. c. 279.

IV.

The present case does not present any question of special importance.

Magnum Import Co. v. *DeSpoturno Coty,* Adv. Opinions 1922-23, l. c. 588.

V.

The motion for new trial filed by petitioner in the trial court did not preserve the venue question for appellate review.

If the judgment were reversed and the cause remanded to the Court of Appeals, that court would be precluded, under controlling decisions of the Supreme Court of Missouri, from upholding petitioner's contention on the venue question, because petitioner failed in his motion for new trial to preserve the point for appellate review.

Maplegreen Co. v. *Trust Co.,* 237 Mo., l. c. 362-363.
State ex rel. v. *Woods,* 234 Mo., l. c. 25.

It is true that when the case was pending in the Court of Appeals before, that court chose, as a matter of grace rather than as a matter of right, to review the venue question on its merits; but before the Court of Appeals could decide the question favorably to the petitioner, it must be assumed that that court would follow the above controlling decisions of the Supreme Court, and hold that the point was not presented for review.

While this is a matter of state practice, yet it is material here, for if the cause were remanded to the state court, the petitioner would gain nothing, not having preserved the venue question properly for review by the state Court of Appeals.

VI.

The mandate of the Court of Appeals was filed in the trial court more than two months before the petition for certiorari was filed in this Court, and the petition should be dismissed because of petitioner's laches.

Petitioner is asking this Court to review a judgment which petitioner by his own laches has allowed to become final, so far as the Court of Appeals and the trial court are concerned, the Court of Appeals having lost jurisdiction of the cause when the mandate went down and was filed in the trial court.

Petitioner could have applied to the Court of Appeals for an order withholding the mandate.

State ex rel. Berkshire v. *Ellison*, 230 S. W., l. c. 972.

Magnum Import Co. v. *DeSpoturno Coty,* Adv. Opinions 1922-23, l. c. 588.

Petitioner should be barred by his own laches from obtaining the review he seeks.

State ex rel. Berkshire v. *Ellison,* 230 S. W., l. c. 972-973.

ARGUMENT.

I.

General Order 18a does not relate to jurisdiction of the subject matter of the action, but only to the venue of the action, and was therefore a subject of waiver by the defendant.

As pointed out in our original brief, this Court in the case of *Alabama & Vicksburg Ry. Co.* v. *Journey*, 42 Sup. Ct. Rep. 6, upheld General Order 18a as an order fixing venue, saying:

> "It was within the powers of the Director General to prescribe the *venue* of suits; and the facts set forth in the order show both the occasion for it and that the *venue* prescribed was reasonable." (Italics ours.)

There has always been a broad and well defined distinction in law between statutes fixing venue and statutes conferring or withholding jurisdiction of the subject matter of suits, and the above language was of course used by this Court advisedly and with the fullest appreciation of that distinction. The petitioner now asks this Court, in effect, to overrule what it has held in the Journey case and to declare that General Order 18a is an order relating to jurisdiction over the *subject matter* instead of an order fixing *venue*.

We respectfully submit that in the light of the provisions of the Federal Control Act, and par-

ticularly Section 10 thereof, and of the decision of this Court in *Missouri Pacific Railroad Company* v. *Ault,* 256 U. S. 554, General Order 18a can be upheld only as a *venue* order, and that it was not within the power of the Director General to promulgate an order affecting jurisdiction of the *subject matter* of actions such as the one at bar. In the Ault case, *supra,* referring to Section 10 of the Federal Control Act this Court said:

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies might interfere with the needs of Federal operation. * * * The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control. * * * Thus under paragraph 10 if the cause of action arose prior to Government control, suit might be instituted or continued to judg-

> ment against the company as though there had been no taking over by the Government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest *as by fixing the venue*, or the time for trial. If the cause of action arose while the Government was operating the system the 'carrier while under Federal control' was nevertheless to be liable and sueable. * * * The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law, etc. * * * Wherever the law permitted compensatory damages they may be collected against the carrier while under Federal control."

We respectfully call to the Court's attention the fact that up until the time of the decision of this Court in the Journey case it had been held by numerous courts of respectable authority that General Order 18a could not be upheld on any theory, even as a venue order. Such decisions were based upon the ground that by Section 10 of the Federal Control Act it was provided without qualification that "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered *as now provided by law.*" And it was quite generally thought that the preceding sentence in Section 10, "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be incon-

sistent with the provisions of this Act or any other Act applicable to such Federal control, or with any order of the President," placed no limitation whatever upon the right given by the Act to sue the carriers in cases such as the one at bar. We have cited a great number of these cases at page 27 of our original brief. In addition to those cases we call attention to an article in the Central Law Journal, Vol. 88, No. 9, February 28th, 1919, by Mr. Edgar Watkins, author of Watkins on Shippers and Carriers, where he said:

> "The phrase, 'except in so far as may be inconsistent * * * with any order of the President,' contained in Section 10, copied *supra,* from the Act of March 21, limits only the sentence referring to the 'liabilities' of the carriers and is the only language that could be construed as giving the President any power to issue orders limiting rights granted or retained by the Act. At the time of the passage of this Act there were statutory 'liabilities' of the carriers requiring an interchange of traffic, prohibiting pooling freights, compelling the filing of tariffs and fixing rules for the establishment of through routes. Those statutory provisions were such as likely to hamper the purpose of unification of the transportation systems; and there was, therefore, necessity for power in the executive, when the facts demanded, to make orders suspending the 'liabilities' created by such statutes. This power granted the President is valid, as it is legal to give an administrative agency the function of determining when the facts come under a rule prescribed by the Legislative Department.

> There is no exception in the next sentence, and actions and suits may be brought 'against' the 'carriers,' 'as now provided by law,' and notwithstanding 'the carrier is an instrumentality or agency of the Federal Government.' No power is given anyone to limit this right or to deprive suitors thereof."

With great respect we earnestly submit that this Court has gone to the uttermost limit of the Federal Control Act in upholding General Order 18a, even as a *venue* order. For in view of the provision of Section 10 that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered *as now provided by law,*" and in view of the fact that by existing law suits could be brought against a carrier *in any county where it had an agent*, there is certainly strong support for the argument that the general order was in direct conflict with that provision of the Federal Control Act.

But if the Court should now go still further and construe the order as one withdrawing jurisdiction of the *subject matter* from the Circuit Court of Jackson County, Missouri, in cases like this one, then this would be tantamount to saying that the Director General had it in his power to completely nullify all of the provisions of Section 10 of the Federal Control Act. For if the Director General by this order could withdraw jurisdiction of the subject matter of such cases from one court, then he might by the same token withdraw such jurisdiction from all courts and make it impossible for

any action arising under Federal control to be enforced against the carrier.

It is evident that the order can be sustained only, if at all, as a *venue* measure, and not as a regulation controlling jurisdiction of the *subject matter.*

The Supreme Court of Missouri has recently construed General Order 18a as a venue measure in the late case of *Caldwell* v. *Payne, Director General,* 246 S. W., l. c. 316.

In our original brief we have cited a large number of decisions by this Court to the effect that the immunity of a defendant from suit in a given venue is in the nature of a personal exemption or privilege, *which defendant may waive.* Other decisions in addition to those cited in our original brief, to the same effect, are as follows:

In the case of *United States* v. *New York & Oriental Steamship Co.,* 216 Fed. 61, the Circuit Court of Appeals for the Second Circuit had for consideration a suit brought against the United States in the wrong district. The law officers of the Government entered a general appearance, but immediately filed a demurrer charging that the court did not have jurisdiction of the subject of the action, *the ground of the demurrer being that the Tucker Act required the suit to be brought only in the district where plaintiff resided, and that the suit was not so brought.* This situation, according to the contention of the Government, deprived the court of jurisdiction of the *subject matter*—the identical contention made by the petitioner in the case at bar. After a review of the

authorities, the Circuit Court of Appeals held (l. c. 69):

> "It seems to us clear that the general intent of the Tucker Act is to open the courts of the United States to suits against the Government as respects the claims specified in that Act, and that the intention was that they should be open to aliens as well as to citizens. And it may be that the provision which requires suits to be brought in the district where the plaintiff resides is applicable only to aliens and citizens residing in the United States, and that persons residing outside the United States may bring suit in any district. But we do not find it necessary to express any opinion upon that question. In our opinion, if the provision which requires the plaintiff to bring suit in the district in which he resides is applicable to nonresident aliens and to citizens residing abroad, *nevertheless the requirement is a personal privilege which the law officers of the Government may waive and in this case did waive by putting in a general appearance.* In *Farrar & Brown* v. *United States*, 3 Pet. 459, 7 L. Ed. 741, Chief Justice Marshall held that the Attorney General of the United States *by a general appearance cured any defect in the service of process on the United States, and that the general rule that such an appearance cured a defect in process was applicable to the United States as well as to any private litigant.*"

We call the attention of the Court to the fact that in the case just cited the same situation existed as in the case at bar, namely, the defendant en-

tered a general appearance, and thereafter immediately challenged the jurisdiction of the court over the subject matter on the ground that the suit was brought in the wrong venue. We respectfully submit that the case is directly in point.

And in the late case of *Lee* v. *Chesapeake & Ohio Railway Co.*, 43 Sup. Ct. Rep., l. c. 231, this Court, as recently as January, 1923, has again held that Section 51 of the Code relating to the venue of suits brought in District Courts:

> "does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, *but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election,* and does waive if, when sued in some other district, he enters an appearance without claiming his privilege."

In the case of *Sonken-Galamba Iron & Metal Co.* v. *Hines, Director General,* 238 S. W., l. c. 138, the Kansas City Court of Appeals said:

> "The Director General operating the Erie Railroad entered his appearance in the cause by filing his answer, a motion to elect, giving notice to take deposition, and after verdict and judgment was entered solely against him as operator of the Erie Railroad, he filed a motion for a new trial and application for an appeal. We think, under such circumstances, there is no question but that defendant entered his general appearance. *Brown* v. *British Dominion General Insurance Co.*, (Mo. App.) 228 S. W. 884; *Roberts* v. *American National Assur. Co.*, 201 Mo. App. 239, 212

S. W. 390; *Bush* v. *Block*, 193 Mo. 704, 187 S. W. 153. *We see no reason why the Director General could not enter his general appearance in a case of this kind, as well as any ordinary defendant. Seaver* v. *Hines*, (D. C.) 261 Fed. 239, 240."

In the light of the foregoing decisions and of the great number of decisions cited in our original brief, we see no escape from the proposition that General Order 18a had no greater or other effect that to prescribe venue; and that the privilege which the Director General enjoyed of being sued in the particular venue prescribed by that order was an exemption or immunity which he could waive by his general appearance.

Petitioner in his brief calls attention to the fact that our reply to defendant's answer pleaded the invalidity of General Order 18a. That is quite true. At the time the reply was filed, the Smith Journey case had not been decided, and General Order 18a had been held by many courts to be in conflict with the Act of Congress of March 21, 1918, and therefore invalid. (See cases cited at page 27 of our original brief.)

But the petitioner cannot consistently criticise respondent for having raised the invalidity of General Order 18a. For we note that in the case of *McGrath* v. *Payne, Director General*, 245 S. W. 1061 (a case growing out of the same wreck in which respondent was injured), the Director General *did not plead* General Order 18a, or raise the venue question in any way. And this, too, in spite

of the fact that if the order had been then deemed valid by the Director General it could have been properly pleaded; for the action in that case was not brought in the county of plaintiff's residence or in the county where the cause of action accrued. It is therefore apparent that prior to the opinion in the Smith Journey case upholding General Order 18a, learned counsel for the Director General himself believed the order to be invalid. (We may add that after the decision of the Smith Journey case the appellant in the McGrath case undertook to raise the point by a motion for a rehearing in the Supreme Court of Missouri; but since the point was not raised in the trial court, it was not noticed.)

II.

The defendant in the trial court waived the provisions of General Order 18a by his general entry of appearance in the trial court.

The record shows that on ~~three~~ four different occasions the defendant Director General entered a general appearance in this cause: First, by filing a motion to strike out an amendment to the petition, his said motion not in any way raising any question of venue and not limiting his appearance as special (Trans., p. 6); ~~second~~ third, by filing an answer containing a plea to the merits coupled with a plea to the venue (Trans., p. 7), which was equivalent to a general appearance (*Western Loan & Savings Co.* v. *Mining Co.*, 210 U. S. 368; *United States* v.

Steamship Company, 216 Fed., l. c. 69; and [illegible], upon the substitution of Payne for Hines, by *expressly* entering his appearance and adopting Hines' answer (Trans., p. 8).

As pointed out by the Court of Appeals in its opinion in this case, in discussing the last entry of appearance, the defendant John Barton Payne could have refused to enter his appearance and could have stood upon his rights under General Order 18a. In such event, he could only have been brought into court by means of a summons served upon him in the usual and ordinary way. But he did not see fit to do this. He *voluntarily* entered his appearance. His conduct was dictated by *his own volition* solely. It seems almost self-evident that such conduct on defendant's part was a waiver of the immunity from suit in that venue.

In our original brief we have cited a great many cases decided by this Court upholding the proposition that the general entry of appearance by the petitioner was a waiver of the venue question. Other authorities to the same effect are as follows:

United States v. *New York & Oriental Steamship Co.*, 216 Fed. (C. C. A.), l. c. 69.

Lee v. *Chesapeake & Ohio R. R. Co.*, 43 Sup. Ct. Rep., l. c. 231.

Sonken-Galamba Iron & Metal Co. v. *Hines, Dir. Gen.*, 238 S. W., l. c. 138.

The petitioner in his brief lays great stress upon the fact that, after entering his appearance, he

adopted the answer theretofore filed by his predecessor, containing a plea to the venue coupled with a plea to the merits. This did not prevent the appearance from being general. In *Western Loan & Savings Co.* v. *Mining Co.*, 210 U. S. 368, this Court held that the filing by defendant of a demurrer going to the *merits* as well as to the *jurisdiction*, is a waiver of the objection that the suit was brought in the wrong venue. Identically the same principle is announced in *United States* v. *New York & Oriental Steamship Co.*, 216 Fed. (C. C. A.), l. c. 69.

It may be urged by the petitioner that the mere change in the person of the Director General from Walker D. Hines to John Barton Payne did not constitute a change in the identity of the defendant, and that the entry of appearance by John Barton Payne did not change the situation because Walker D. Hines was already in court. But the answer to this is plain: (1) The record shows that John Barton Payne "entered his appearance in said cause" (Trans., p. 8); and this affirmative, overt act by the defendant, in entering his appearance, was as much a waiver of the venue question as if the original defendant Walker D. Hines had on that day again "entered his appearance in said cause." (2) Furthermore, Walker D. Hines had previously entered his appearance on ~~two~~ three different occasions, first, by appearing generally and filing his motion to strike out an amendment of the petition (Trans., p. 6), this being prior to any objection to the venue; and thereafter by filing an answer containing a plea to the merits coupled

with a plea to the venue (Trans., p. 7). This was a general appearance by Hines (*Western Loan & Savings Co.* v. *Mining Co.,* 210 U. S. 368; *U. S.* v. *Steamship Co.,* 216 Fed. [C. C. A.], l. c. 69). So that it makes no difference whether the change in the person of the Director General be disregarded as immaterial. The fact remains that *on three different occasions* the defendant Director General entered a general appearance in the cause (Trans., pp. 6, 7, 8).

The petitioner makes frequent reference throughout his brief to the fact that he did not "intend" by entering his appearance to waive the venue. It is not a question of what he now says he intended. *He is conclusively presumed to intend the legal consequences of his acts.* The necessary legal consequence of a general entry of appearance is to waive all objections to the venue. The petitioner is conclusively presumed to have intended that result when he entered his general appearance.

For the first time in the history of this case the petitioner now raises the point that the Director General had no authority to waive the exemption from suit in this case in Jackson County. This point was not raised in the Court of Appeals, or in the Supreme Court of Missouri, or in the original brief filed by the petitioner in this Court. It is raised for the first time in petitioner's belated supplemental brief. The contention has all the ear marks of an eleventh hour after-thought.

As we understand petitioner's argument of this point, it is founded upon the following proposi-

tions: (1) A suit against the Director General is a suit against the United States. (2) The United States cannot be sued without its consent. (3) Statutes granting the right to sue the United States must be strictly construed. (4) The Director General could not enlarge the rights given by Congress to sue the United States.

From these four propositions he attempts to draw the conclusion that if respondent did not have the right under the law to institute this suit in Jackson County (instead of Andrew County), then the Director General had no authority to grant that right by entering his appearance in Jackson County.

We do not dispute the premises, but we do dispute the conclusion which petitioner draws therefrom. We concede that a suit against the Director General is a suit against the United States; that the United States cannot be sued without its consent; that statutes granting the right to sue the United States are to be strictly construed; and that the Director General could not enlarge the rights given by Congress *to sue the United States.*

But the petitioner completely ignores the important fact that *the United States did grant to the respondent the right to sue the Director General.* This was granted by the Federal Control Act of March 21, 1918. The material parts of Section 10 of the Federal Control Act are as follows:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State

> or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. * * * But no process, mesne or final, shall be levied against any property under such Federal control."

This language is as plain as language can be made. It expressly granted the right to bring suits against the Director General. And no matter what rules of strict construction petitioner may seek to apply, this right so plainly and unequivocally granted cannot be whittled or pared away.

Furthermore, the grant was not made by Congress conditional upon suit being brought in any certain venue. On the contrary, the grant was unqualified in this respect, the act providing that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered *as now provided by law.*" It was not Congress who limited the venue of suits against the Director General. It was the Director General himself who did that, by General Order 18a.

It seems almost self-evident that the Director General who made and promulgated General Order 18a, necessarily had the authority to revoke it entirely, or to waive it in any given case

if he saw fit to do so. For, if he had the authority under the Federal Control Act to *make* the order (and the Smith Journey case holds that he had), then certainly he had the power to revoke it or *waive* its provisions in any given case if he saw fit. The sound reason of this proposition seems apparent. United States v. Kolenc 226 Fed (C.C.A.

Suppose, for the sake of argument, that in this particular case the Director General had deemed it more convenient to himself and to his witnesses, and therefore to his own advantage, to try this case at Kansas City in Jackson County, rather than in the rural, out-of-the-way county seat of Andrew County, Missouri. And suppose that plaintiff, by the *express consent* of the Director General, had brought the suit in Jackson County, although according to General Order 18a the proper venue lay only in Andrew County. Would the Director General in such case now be heard to say to this Court: "Although I *expressly agreed* to be sued in Jackson County, and entered my *general appearance* there, and tried the case on its merits there, yet I repudiate the judgment as void, because I had no authority to waive the general order which I myself made?" We confidently assert that the petitioner could never successfully maintain that contention before this Honorable Court.

And yet his present position differs not at all, in principle, from that. Petitioner is bound to concede that Congress gave respondent the right to sue him. He must further concede (for the record so shows) that on three different occasions

he entered his general appearance in the suit filed in Jackson County (Trans., pp. 6, 7, 8). And he can hardly deny the principle that a *general appearance is equivalent to an express waiver* of the objection that a suit is brought in the wrong venue. Yet in spite of all this, the petitioner (perhaps realizing that he cannot prevail upon the proposition that General Order 18a relates to jurisdiction of the subject matter, and that a general appearance would therefore not be a waiver) now makes the belated contention that he had no authority to enter his general appearance. We earnestly submit that the petitioner should not be permitted to successfully repudiate his authority.

This Court at an early day passed upon the authority of the Attorney General of the United States to waive defects in the service of process upon the United States by entering a general appearance. In the case of *Farrar & Brown* v. *United States,* 3 Pet. 459, Chief Justice Marshall said:

> "The practice has uniformly been, ever since the seat of government was removed to Washington, for the clerk to enter, at the first term to which any writ of error or appeal is returnable, the appearance of the attorney-general in every case to which the United States are a party, by entering his name on the docket. This practice must have been known to every attorney-general, and has never been objected to. It might be considered, therefore, as having an implied acquiescence on the part of the attorney-general, although it is admitted that there is

no evidence of any express assent. We do not say that this practice would be conclusive against the attorney-general, if he should at the first term withdraw such appearance, or move to strike it out, in order to take advantage of any irregularity in the service of process. But if he lets it pass for that term, without objection, we think it is conclusive upon him as to an appearance.

The decisions of this court have uniformly been that an appearance cures any defect in the service of process; *and there is nothing to distinguish this case from the general doctrine.*"

In the case of *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549, the Fleet Corporation made the contention that it was immune from suit because it was an agency of the government. This Court recently disposed of that contention in the following language (l. c. 566-567):

"These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. *But the general rule is that any person within the jurisdiction always is amenable to the law.* If he is sued for conduct

> harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. *Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court.* An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. *Osborn* v. *Bank of United States,* 9 Wheat. 738, 842, 843; *United States* v. *Lee,* 106 U. S. 196, 213, 221." (Italics ours.)

The inference, plainly to be drawn from the words which we have italicized, is that if the powers of the Fleet Corporation had been given to a single man, he would stand on exactly the same plane, so far as responding to an action in court is concerned, as any other litigant. And, since any other litigant can, by entering a general appearance, waive an objection to venue, the conclusion necessarily follows that the Fleet Corporation or the Director General could do so.

In the case of *United States* v. *Oriental Steamship Company,* 216 Fed. 69, the Circuit Court of Appeals for the 2nd Circuit held:

> "In our opinion if the provision which requires the plaintiff to bring suit in the district in which he resides is applicable to nonresident aliens and to citizens residing abroad, nevertheless the requirement is a personal

> privilege *which the law officers of the government may waive and in this case did waive by putting in a general appearance.* In *Farrar & Brown* v. *United States,* 3 Pet. 459, 7 L. Ed. 741, Chief Justice Marshall held that the Attorney General of the United States by a general appearance cured any defect in the service of process on the United States, *and that the general rule that such an appearance cured a defect in process was applicable to the United States as well as to any private litigant."*

We call attention to the fact that in that case the venue was prescribed by an Act of Congress, not by the departmental order of a government official; yet it was held that the law officers of the government could waive the objection that the suit was brought in the wrong venue. That case is directly in point here. For certainly if an officer of the government could waive objection to venue fixed by statute, he could waive it if fixed by his own order.

And in *Sonken-Galamba Iron & Metal Co.* v. *Hines, Director General,* 238 S. W., l. c. 138, it was held:

> "The Director General operating the Erie Railroad entered his appearance in the cause by filing his answer, a motion to elect, giving notice to take deposition, and after verdict and judgment was entered solely against him as operator of the Erie Railroad, he filed a motion for a new trial and application for an appeal. We think, under such circumstances, there is no question but that defendant en-

tered his general appearance. *Brown* v. *British Dominion General Insurance Co.*, (Mo. App.) 228 S. W. 884; *Roberts* v. *American National Assur. Co.*, 201 Mo. App. 239, 212, S. W. 390; *Bush* v. *Block*, 193 Mo. 704, 187 S. W. 153. *We see no reason why the Director General could not enter his general appearance in a case of this kind, as well as any ordinary defendant. Seaver* v. *Hines*, (D. C.) 261 Fed. 239, 240."

In the case of *Johnston* v. *Stimmel*, 89 N. Y. 117, (affirming 26 Hun. 435) it was held that the United States by voluntarily appearing in a state court as claimant of a fund therein, subjects itself to the jurisdiction of the court, although otherwise the state court could acquire no jurisdiction over it.

In Re The F. J. Luckenbach, 267 Fed. 931, it was held that the United States fully submitted itself to the jurisdiction of the court by filing a bond to prevent a stay of proceedings in the cause.

We respectfully submit that the rule announced in these cases should apply here; and that it should be held that the petitioner had the authority to enter his general appearance, and thereby waive objection to the venue.

The authorities cited by petitioner do not conflict at all with this conclusion. In *United States ex rel. Texas Portland Cement Co.* v. *McCoy*, 233 U. S. 157, the parties who brought the suit upon the contractor's bond had no right to sue within six months, because within that time the right to sue was in the United States exclusively.

Obviously that case does not even remotely approach the question in this case. In *Carr* v. *United States*, 98 U. S. 433, it was held that consent by the United States to be sued must be evidenced by an Act of Congress, and that government officers cannot waive the privilege of the United States *in this respect*. That of course, is true; but the consent of the United States to permit this suit to be brought against the Director General *was evidenced* by the express terms of the Federal Control Act, quoted *supra*. And it is not a question here of the Director General waiving the immunity of the United States from *suit* (for the right to be sued was already granted by Congress), but the question here is whether the Director General waived the right to be sued *only in a certain county*. The decision in the case of *Stanley* v. *Schwalby*, 162 U. S. 255, and the rule quoted from 29 Cyc. 776, by petitioner, are distinguishable on this same ground. The effect of the decision in *Goldsmith* v. *Revenue Cutter*, 6 Ore. 250, is not correctly stated by petitioner. That case only holds that by entering a general appearance and pleading to the merits, the United States government does not waive its *immunity from suit, in a case where Congress had never given the right to sue.*

We respectfully submit that the petitioner had the authority to enter a general appearance and waive all objection to the venue, and that the record in this case shows that he did so.

III.

The decision by the Court of Appeals rests on a non-Federal ground broad enough to sustain it, and therefore this Court should not disturb the decision.

The only proposition decided by the Court of Appeals, of which the petitioner is complaining, is that the defendant voluntarily entered a general appearance in the cause and thereby waived his objection to the venue.

Whether defendant's conduct constituted a waiver was clearly a non-Federal question. This Court has held that a case which turns on a question of *waiver* presents no Federal question for review.

In the case of *Kansas City Star Co.* v. *Julian,* 215 U. S. 589, the defendant company objected to the venue in which the suit was brought and alleged that a statute authorizing suit to be brought in that venue was in violation of the Federal Constitution. The Missouri Supreme Court held (209 Mo. 37) that by filing an application for change of venue the defendant *had entered a general appearance and thereby waived the objection to the venue.* Thereupon defendant sued out a writ of error from this Court to review the decision of the Missouri Supreme Court. This Court disposed of the case in the following *per curiam* opinion:

> *"Per Curiam.* Writ of error dismissed for want of jurisdiction. *Sayward* v. *Denny,* 158 U. S. 180; *Mutual Life Ins. Co.* v. *McGrew,*

188 U. S. 291, 307, 308; *State* v. *Bland*, 186 Missouri 691, 701; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 653; case below, 209 Missouri 35.

The attention of the state Supreme Court was not called to any Federal question until in the petition for rehearing, and that was too late. *Loeber* v. *Schroeder*, 149 U. S. 580, 585, and cases.

"The judgment rested on non-Federal grounds broad enough to sustain it. 209 Missouri 35; *Cincinnati Street Ry. Co.* v. *Snell*, 193 U. S. 30; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322."

We submit the Julian case cannot be distinguished from this case. In each case the defendant was objecting to the venue. In each case the defendant entered a general appearance. In each case the state court held that the general appearance waived the objection to the venue. In the Julian case this Court held that the decision by the state court rested on a non-Federal ground broad enough to sustain it. In this case we respectfully submit that the same result should follow.

In the case of *Eustis* v. *Bolles*, 150 U. S., l. c. 369, the plaintiff in the trial court contended that a statute of Massachusetts had the effect to impair the obligation of a contract and was therefore unconstitutional. The Supreme Judicial Court of Massachusetts disposed of the case, however, on the ground of a *waiver* by the plaintiff. The plaintiff sued out a writ of error from this Court to review the decision. In dealing with the juris-

diction of this Court to review the decision, it was held (l. c. 369):

> "But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a *waiver, the court below did not decide a Federal question.* Whether that view of the case was sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the Federal question."

In *Beaupre* v. *Noyes,* 138 U. S., l. c. 402, the case involved a Federal question, and also a question of waiver. This Court disposed of the case in the following language:

> "Whether the state court so interpreted the territorial statute as to deny such right to the plaintiffs in error, we need not inquire, for it proceeded, in part, upon another and distinct ground, not involving any Federal question, and sufficient, in itself, to maintain the judgment, without reference to that question. That ground is, that there was evidence tending to show that the defendants acquiesced in and assented to all that was done, and *waived* any irregularity in the mode in which the assignee conducted the business; and that the question whether the defendants so acquiesced and assented with knowledge of all the facts and thereby *waived* their right to treat the assignment as fraudulent, was properly submitted to the jury. The state court evidently intended to hold that, even if the assignment was originally fraudulent, as

against the creditors, by reason of Young remaining in the store as clerk for Winchester, and assisting the latter in carrying on the business, it was competent for the plaintiffs in error to *waive* the fraud and treat the assignment as valid for all the purposes specified in it. *That view does not involve a Federal question. Whether sound or not, we do not inquire.* It is broad enough, in itself, to support the final judgment, without reference to the Federal question, and for that reason the judgment must be affirmed."

It seems clear, therefore, that the question of what constitutes *waiver* is a purely non-Federal question.

The mere fact that the venue in this case was prescribed by Federal authority does not alter the fact that the Court of Appeals' decision (to the effect that the venue was waived) was nothing more or less than the decision of a purely state question. The decision that defendant *waived* the venue by entering his appearance is a decision of a non-Federal question, *even though the venue was prescribed by Federal authority.*

John v. *Paullin*, 231 U. S., l. c. 585.

The Court of Appeals simply decided a question of local practice, nothing more. It is uniformly held that this Court will not review decisions of state courts involving only questions of state practice.

Washington v. *Miller*, 235 U. S., l. c. 429.
Central Vermont Ry. v. *White*, 238 U. S., l. c. 513.

And of course this Court has consistently refused to review decisions of state courts based on non-Federal grounds broad enough to sustain them.

Bilby v. *Stewart,* 246 U. S. 255.
Cuyahoga River Power Co. v. *Northern Realty Co.,* 244 U. S. 300.
Kansas City Star Co. v. *Julian,* 215 U. S. 589.
Enterprise Irrigation District v. *Canal Co.,* 243 U. S. 157.
Consolidated Turnpike Co. v. *Railway Co.,* 228 U. S. 596, l. c. 599.
Mellon v. *McCafferty,* 239 U. S. 134.
Howat v. *State of Kansas,* 42 Sup. Ct. Rep., l. c. 279.

IV.

The present case does not present any question of special importance.

In our original brief we have cited cases decided by this Court holding that the writ of certiorari should only be issued in case some special ground is shown presenting a question of gravity and general importance. Since that brief was written, this Court has handed down the opinion in the case of *Magnum Import Co.* v. *DeSpoturno Coty,* Advance Opinions 1922-23, l. c. 588, where this Court said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes: First, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up

> cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. * * * These remarks, of course, apply also to applications for certiorari to review judgments and decrees of the highest courts of states."

General Order 18a, which was a war measure, has long since been superseded by the Transportation Act, providing that suits against the Federal Agent "can be brought in any court which, but for Federal control, would have had jurisdiction of the cause of action had it arisen against such carrier." The number of cases involving the venue question presented here is probably negligible.

We respectfully submit that the petitioner has presented no case of gravity or general importance, and that the petition should be dismissed.

V.

The motion for new trial filed by petitioner in the trial court did not preserve the venue question for appellate review.

The answer filed by defendant in the trial court pleaded General Order 18a, and alleged that the

suit was not brought in the proper county or district (Trans., p. 7-8). After the trial had begun and some testimony had been taken, defendant objected to the introduction of any testimony on the same ground, and this objection was overruled and exception taken (Trans., p. 16). Defendant did not undertake to raise the point in any other way during the trial.

After the verdict and judgment defendant filed a motion for a new trial in which he alleged error of the trial court in rulings upon evidence and the instructions, and in other respects, *but defendant said nothing in his motion for a new trial in regard to the matter of jurisdiction or venue, and did not undertake to preserve that question in any manner.* (At that time General Order 18a had been held invalid in the Missouri Supreme Court and the courts of appeals, and the Smith Journey case had not been decided; and the defendant by his motion for new trial apparently abandoned the contention based on General Order 18a.)

After filing the motion for a new trial, and before the case was submitted in the Court of Appeals, the Smith Journey case was decided by this Court, upholding General Order 18a. Thereupon the defendant undertook to renew its contention based upon General Order 18a. And the Court of Appeals, notwithstanding the fact that the point had not been preserved in the motion for a new trial, chose to deal with the question upon its merits.

If the petitioner should obtain a reversal of the judgment of the Kansas City Court of Appeals in

this cause, and the cause were remanded to the Court of Appeals for further proceedings consistent with this Court's opinion, and if the case should come on for a second hearing in the Court of Appeals, the petitioner (the appellant in that court) would of course be met with the contention that it had failed to preserve its point in the motion for a new trial. And the Court of Appeals, under controlling decisions of the Supreme Court of Missouri, would be compelled to uphold that contention, and to refuse to review the question.

It is well settled by the decisions of the Supreme Court of Missouri that before an appellate court of Missouri can review an error of trial courts, an assignment of such error must be made in a motion for a new trial. In the case of *Maplegreen Co.* v. *Trust Co.*, 237 Mo. l. c. 362-363, the Supreme Court of Missouri said:

> "A motion for a new trial, in the system now in vogue, fills a substantial and useful office in administering justice through the courts. Questions are suddenly sprung on a trial judge by versatile and ingenious counsel during the hotfoot of a trial, which he perforce must decide without taking time to consider. No mortal judge is allowed to be so incomparably recondite and ready as to know all the law all the time. If he knew all the law some of the time, or some of the law all the time, or some of the law some of the time (thereby putting himself outside of the class of those who know none of the law none of the time), he rises to a permissible high-water mark of excellence. Accordingly,

> the office of a motion for a new trial is to gather together those rulings complained of as erroneous and solemnly and formally present them, one by one, in black and white, to the judge, in order that he have a last chance to correct his own errors without the delay, expense or other hardships of an appeal. This, on the theory that even a judge is entitled to a last chance—a *locus poenitentiae.*"

And on page 365 of the same case the court said:

> "In this condition of things, although counsel may not have intended to waive these exceptions or waive their complaint of the court in overruling them, *yet they do that very thing by pretermitting all reference thereto in the motion for a new trial.*"

And in *State ex rel.* v. *Woods,* 234 Mo. l. c. 25, the Supreme Court of Missouri said:

> *"Before this court can review the alleged errors, the attention of the trial court must be called thereto by a motion for new tiral."*

It is true that when this case was before the Court of Appeals, that court chose to review the venue question on its merits; but in view of the record, the court could have refused to so review it. The petitioner obtained a review of that question as a matter of grace on the part of the Court of Appeals, rather than as a matter of right. Before the Court of Appeals could have decided the

question favorably to the petitioner, we must assume that that court would have followed the controlling decisions of the Supreme Court, and have held that the point was not presented for review.

While this all relates to a matter of purely state practice, yet we respectfully submit that it is material to urge it here. For in the event the Court of Appeals' judgment were reversed and the cause remanded by this court to that court for further proceedings, *the petitioner would really gain nothing by that course, not having preserved the point properly for review by the Court of Appeals.*

VI.

The mandate of the Court of Appeals was filed in the trial court more than two months before the petition for certiorari was filed in this Court, and the petition should be dismissed because of petitioner's laches.

The judgment of the trial court was affirmed by the Court of Appeals on February 20th, 1922 (Trans., p. 158). The motion for rehearing was denied by the Court of Appeals on April 3rd, 1922 (Trans., p. 169). The petitioner filed no motion, and took no other steps, in the Court of Appeals to obtain a withholding of the mandate. Thereafter on April 14th, 1922, the mandate of the Court of Appeals in this cause was sent down to the trial court and filed therein on that day. (We have filed here the certificate of the clerk of the

Circuit Court of Jackson County, Missouri, showing that fact.)

This all occurred more than two months before the petitioner filed his petition for certiorari in this court, and before petitioner had served notice of his petition upon respondent. Petitioner served respondent with notice of his petition on June 30th, 1922, and filed his petition on July 3rd, 1922—*two months and nineteen days after the mandate of the Court of Appeals had been filed in the trial court.*

This presents an anomalous situation. The petitioner is asking this Court to review a judgment which petitioner by his own laches has allowed to become final, so far as the Court of Appeals and the trial court are concerned. The Court of Appeals lost jurisdiction of the cause when the mandate went down.

There is no reason why petitioner could not have applied to the Court of Appeals for an order withholding the mandate, in order to give the petitioner time in which to prepare his petiton for certorari and present the same to this court. The Missouri practice in such cases would have afforded petitioner ample opportunity to have the mandate held, if he had made the proper application. As the Supreme Court of Missouri said in *State ex rel. Berkshire* v. *Ellison,* 230 S. W., l. c. 972:

> "It is clear that the aggrieved party should be granted by the appellate court, if notice is given of a desire to apply for our writ of certiorari, a reasonable time to make such application and procure our ruling thereon. *This the appellate courts of this state have*

always done so far as we have been able to learn."

This Court had occasion to deal with a similar situation in the recent case of *Magnum Import Co. v. DeSpoturno Coty*, Advance Opinions 1922-23, l. c. 588, where the court said:

> "The petition should, in the first instance, be made to the Circuit Court of Appeals, which, with its complete knowledge of the cases, may, with full consideration, promptly pass on it. That court is in a position to judge, first, whether the case is one likely, under our practice, to be taken up by us on certiorari; and second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate."

But the petitioner did not choose to follow the approved practice, and stood idly by and allowed the mandate of the Court of appeals to go down to the trial court, and the judgment of the trial court thereby to become final.

Petitioner did not even file a motion in the Court of Appeals, during the March term, 1922, requesting that court to *recall* its mandate, as he might have done.

In short, the petitioner did nothing, but waited until July 3rd, 1922, (the last day on which to file petition for certiorari in this court), and then filed his petition here.

We respectfully submit that such dilatory practice ought not to be encouraged, and the laches

of the petitioner bars him from obtaining the review he seeks.

State ex rel. Berkshire v. *Ellison*, 230 S. W. l. c. 972-973.

For the reasons submitted in our original brief and in the foregoing supplemental brief, we respectfully pray that the petition be dismissed, or that the judgment be affirmed.

Respectfully submitted,

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